the accident could have been avoided. To a question put by respondents during cross-examination appellant stated there was no guard at the time of accident. Respondents did not adduce any evidence to show that there was a guard. He could easily call someone in authority working in the factory to give such evidence. The guard was installed after the accident. So that when the Inspector of Machinery inspected the factory some eleven months after the accident it was there. In answer to cross-examination he admitted he could not say whether on the date of accident there was any guard.

Even if appellant had been careless or inattentive such conduct could not, in the light of authorities constitute contributory negligence in this type of case. Appellant could do nothing when the log suddenly hit his right elbow pushing his right hand towards the bandsaw blade. The use of a stick to remove the piece of bark may be dangerous. But, this does not make him more to blame. Neither was he to blame merely for failing to switch off the machine. Respondents' evidence was that no sawyer would switch off the machine merely to remove a piece of bark. It would take time for the machine to stop. The accident would not have happened if the logs were properly stacked. Of course under the authority of *Caswell* v. *Powell Duffryn Associated Collieries Ltd*(1) it is open to the learned Judge to find an element of contributory negligence in the conduct of appellant. This is so whether the action is based on breach of statutory duty or negligence.

The very purpose of imposing absolute obligation on employers under the Factories and Machinery Act, 1967 is, it seems to us, to protect the workmen against those very acts of inattention which are sometimes relied upon as constituting contributory negligence so that too strict a standard would defeat the object of the statute. Lord Wright made the position very clear when he said at page 179:–

"The policy of the statutory protection would be nullified if a workman were held debarred from recovering because he was guilty of some carelessness or inattention to his own safety, which though trivial in itself threw him into the danger consequent on the breach by his employer of the statutory duty."

In *Tay Cheng Teck* v. *Tropical Produce Co. Pte. Ltd.*(2) while in the course of duty appellant's right hand got caught between the rollers and was crushed. The learned Judge took into consideration that appellant had been taught to mill the rubber and had been properly instructed in the safe use of the machine. He found appellant to be negligent and that was how the injury was caused to him. He assessed liability at 50%. Compared to this case we cannot see how appellant could be assessed at 80% to blame in the light of the evidence. There was no evidence that appellant was doing any unauthorised act for his own purpose. Neither was appellant negligent as in *Tay Cheng Teck's case.*(2) It was because respondents failed to carry out the statutory obligation to properly stack the logs in a manner to ensure stability that the accident occurred. In *Uddin* v. *Associated Portland Cement Manufacturers Ltd.*(3) plaintiff went to the vicinity of the dust extractor plant where he had no authority to be. While there he tried to catch a pigeon behind a shaft and got caught in the machinery. The learned Judge found plaintiff to be doing an act of incredible folly. Also, he was doing an unauthorised act in an unauthorised place for his own purpose. He awarded plaintiff one fifth only of the damages found. The Court of Appeal upheld his decision. In the light of the evidence and comparing some cases cited we are of the view that it was wrong in principle for the learned Judge to place on appellant's shoulder a far greater weight of a large load of damage. It was unduly harsh to place greater blame on appellant in the circumstances. An appellate court should be slow in interfering with the Judge's apportionment of liability save in very exceptional circumstances. Having regard to all the factors including the object of the Factories and Machinery Act, 1967 we consider that this is one of the exceptional cases where we should come to the aid of appellant. For reasons given, we therefore allow the appeal with costs. We would say appellant is 25% to blame and respondents 75% to blame. Amount of damages assessed by the learned Judge to remain. Deposit to be refunded to appellant.

Order accordingly

Solicitors: *Murphy & Dumbar; R.K. Menon & Co.*

SHELL MALAYSIA TRADING SDN. BHD. v. LIM YEE TECK & ORS.

[F.C. (Lee Hun Hoe C.J. (Borneo), Abdul Hamid F.J. and Abdoolcader J.) March 24 & May 26, 1982]
[Kuala Lumpur – Federal Court Civil Appeal No. 194 of 1980]

Contract – Sale of portion of land – Subdivision – Condition that separate titles in continuation for land will be obtained – Vendors unable to obtain separate titles in continuation except on surrender of portion of land used for petrol and service station in exchange for a lease for 30 years. – Termination of agreement – Claim for specific performance and damages.

In this case the appellants agreed to sell to the respondents a portion of their land in Kuala Lumpur. Respondents paid a deposit of 10% and it was agreed that the balance of the purchase price was to be paid within thirty days of the appellant's notifying the respondents of obtaining separate titles in continuation for the land. At the time of the agreement the appellants had already applied for the development of a petrol filling and service station on the land and had applied for subdivision of the land. The appellants were told that their application would be considered only if they surrendered the portion of the land provided for the petrol and service station in exchange for a lease for 30 years. This condition was rejected by the appellants.

The appellant's solicitors thereupon informed the respondents that they were unable to obtain separate titles in continuation and therefore they returned the 10% deposit and considered the agreement to become null and void. The respondents' solicitors disagreed and returned the earnest money. Subsequently the respondents claimed specific performance and damages for breach of agreement. The learned trial judge gave judgment for the respondents and the appellants appealed.

Held: in this case the appellants had done all they could reasonably be expected of them in pursuing their application for subdivision and when their application was not approved, they were entitled to treat the agreement as having come to an end.

Cases referred to:–

(1) *Pengarah Tanah dan Galian* v. *Sri Lempah Enterprise Sdn. Bhd.* [1979] 1 M.L.J. 135.

(2) *Hargreaves Transport Ltd.* v. *Lynch* [1969] 1 All E.R. 455.

(3) *New Zealand Shipping Co. Ltd.* v. *Societe Des Ateliers Et Chantiers De France* [1919] A.C. 1, 9.

FEDERAL COURT.

C. Abraham (*Miss S.T. Lee* with him) for the appellants.

K.S. Narayanan for the respondents.

Lee Hun Hoe C.J. (Borneo) (delivering the Judgment of the Court): We allowed the appeal with costs both here and the court below and set aside the judgment and ordered the refund of the deposit to the appellants. We did not deal with the counterclaim as it was abandoned. We stated that we would give our reasons later. We do so now.

The appeal is basically a question of construction of clauses 2 and 6 of an agreement entered into by the parties on December 29, 1972. Appellants agreed to sell to the respondents a portion comprised 61,050.0 square feet of their land in Kuala Lumpur described as Lot No. 162, section 63 for $167,889.98. Respondents paid a deposit of 10% as earnest money and the balance of the purchase price was to be paid within 30 days of the appellants' notifying the respondents of obtaining two separate titles in continuation for the land. At the time of the execution of the agreement the appellants had already applied for the development of a petrol-filling and service station on the land as evidenced by the Development Order dated February 19, 1971 (see page 44 of the Appeal Record) issued by the Pegawai Peranchang. Prior to the agreement the appellants had already applied for subdivision by using Form 9A under section 137 of the National Land Code (NLC) on June 6, 1972. The intention of the appellant was to obtain a title in continuation in respect of the portion of land where they wished to construct the petrol station.

By a letter dated October 16, 1973 to the appellants the Pemungut Hasil Tanah stated in paragraphs 3 and 4 as follows:—

"3. You are required to state the written agreement for the surrender of the portion of the land provided for the petrol and service station and to re-issue a lease title for 30 years. This is a policy of the Government to allocate the area for a petrol and service station. 4. Upon your due compliance of the conditions herein stated your application shall then be forwarded to the State Authority for their consideration."

Appellants wrote on November 1, 1973 requesting for reconsideration so that two separate titles in continuation could be issued in respect of the two portions of the land. The Pemungut Hasil Tanah replied on November 10, 1973 that their request for a title in continuation of the said petrol station site could not be considered as it was against the policy of the Government. By paragraph 2 he warned the appellants thus:—

"2. I would like to emphasize that if you were to erect, on the said land, any business buildings, you are said to be in contravention to the conditions of the land and have committed an offence under section 127 of the National Land Code and you may be prosecuted under section 129 of the National Land Code."

Consequently, on November 27, 1973 the appellants' solicitors wrote to the respondents informing them that the appellants were unable to obtain separate titles in continuation pursuant to clause 2 of the agreement unless they were willing to surrender the portion where the petrol and service station was constructed in exchange for a lease of 30 years. Since it was not legally possible to subdivide the land in accordance with clause 6 of the agreement they thereby returned the 10% earnest money. In the circumstances, they considered the agreement to become null and void. On December 5, 1973 the respondents' solicitors replied that they disagreed with the appellants' interpretation of clauses 2 and 6 and returned the earnest money. They made clear that they would hold the appellants to the strict performance of the terms and conditions of the agreement which they considered to be subsisting and in full force and effect.

On February 22, 1974 the appellants tried again by requesting the Pemungut Hasil Tanah to reconsider the matter further. The result was that the authority was prepared to issue two separate titles in continuation but the appellants were to surrender the land on which the petrol and service station was to be erected in exchange for a lease of 30 years. Appellants rejected the offer. By that time the appellants had already terminated the agreement. Subsequently, the respondents filed their writ on September 24, 1974 claiming for specific performance, damages for breach of agreement and costs.

It is convenient here to set out clauses 2 and 6 of the agreement. Clause 2 reads:—

"The Vendor shall (if it has not already done so) make application to the appropriate authority or authorities for the subdivision of the said land so as to result in the issue of separate documents of title in continuation in respect of the said portion and in respect of the balance of the said land."

Clause 6 reads:—

"If for any reason subdivision is refused or for any other reason it shall not be legally possible to subdivide the said land in accordance with the terms of the Agreement then the Vendor shall refund to the Purchaser the earnest money referred to in clause 1 hereof free of any interest whereupon the Agreement shall be null and void and cease to have any further force or effect and neither party shall have any claim against the other in respect thereof."

Clearly the words in brackets in clause 2 (if it has not already done so) indicate that the respondents were aware that application had been made to the appropriate authority. We see no reason for the insertion of those words unless they mean something. The learned Judge pointed out correctly the importance of the words "documents of title in continuation" in clause 2. Since the existing title is one of perpetuity the parties would expect that the titles to be issued after subdivision would be titles of perpetuity.

With respect we do not agree with the learned Judge that the appellants had not complied with clause 2 of the agreement. As mentioned earlier the development of the petrol-filling and service station had been approved in 1971, long before the execution of the agreement. It is true that there is nothing in the agreement to say that the portion of land to be retained by the appellants should be used as a petrol service station. However, we do not think the respondents can say that at the time of the agreement they were not aware that the appellants were using the portion of the land for a petrol-filling and service station. The learned Judge thought that if the appellants elected not to use the site for a petrol station then the Land Office would approve the subdivision and issue separate titles in continuation. We should pause to ask ourselves how would respondents react if the portion to be purchased by them was going to be converted into a leasehold title. They would say it was not an implied term of the agreement that they should accept the leasehold. They would certainly con-

tend that it was the expressed term of the agreement that they should be given a title in continuation. The appellants expect to obtain a title in continuation in respect of the portion of land to be retained by them. If they could not get a title in continuation they would not go through with the application. That seems to be the paramount consideration in so far as the agreement is concerned whether or not they are going to use it as a site for the petrol-filling and service station. It is with respect wrong for the learned Judge in effect to tell the appellants how to conduct their business. Only the appellants can decide whether they want to use the site for a petrol-filling and service station. The learned Judge stated that there was no doubt that the appellants had applied for the subdivision of their land. In fact, he referred to the various documents and letters relating to the applications for subdivision. It can also be argued that there was nothing in the agreement which imposed any specific obligation upon the appellants to cease using the land as a petrol-filling and service station as a price for subdivision. In other words, it was not open to the court to impose terms which the agreement did not contain. The respondents cannot say they did not know that they were dealing with a company whose primary business is selling petrol and diesel through its filling stations.

We are dealing with a situation arising in 1973. The court has no power to make a landowner give up his or her freehold title in exchange for a 99 year lease. This was so decided in 1978 in this court in *Pengarah Tanah dan Galian* v. *Sri Lempah Enterprise Sdn. Bhd.*[1] After referring to the case the learned Judge stated at page 34 of the Appeal Record as follows:–

". . . In the present case the Defendant Company should have pursued the matter in the court by way of appeal if the approving authority refused its application for subdivision on the ground of non-compliance with the condition improperly imposed."

With respect, the learned Judge was clearly wrong as he was in effect rewriting the contract for the parties by imposing a term which could not be imported into the contract. It is unfortunate that the case of *Hargreaves Transport Ltd* v. *Lynch*[2] was not dealt with. In that case the defendant applied for outline planning permission for a piece of land to erect a transport depot thereon. Whilst the application was still pending the defendant agreed to sell the site to the plaintiffs. A deposit was paid and the balance to be paid on April 1, 1966 subject to a condition that the plaintiffs obtain planning permission to use the site as a transport depot and to develop the property by erection of buildings. For the purpose of the agreement planning permission would be deemed not to have been received if such planning permission is subject to a condition which the plaintiffs reasonably considered unacceptable. Plaintiffs submitted detailed plans for approval. Although outline permission was granted, the local council, under local pressure, refused to approve the detailed plans. Plaintiffs rescinded the contract and claimed the return of their deposit under the agreement. Held the plaintiffs were entitled to rescind the contract and to have the return of their deposit. At page 458 Lord Denning, M.R. remarked that:–

". . . Once the local planning authority refused approval of the details, the plaintiffs were entitled to call the deal off. They were not bound to appeal. The defendant may well be aggrieved by the conduct of the local council, but he can have no complaint against the plaintiffs. They did everything which could reasonably be expected of them."

Russell, L.J. expresses his view on this point very clearly at page 459:–

". . . I would entirely agree that it is implicit in the contract that the plaintiffs would take all reasonable steps by way of attempting to get not only the outline planning permission but also the approval of detail under the condition on which that permission was granted and the one question is whether the plaintiff failed in that obligation in that they did not appeal to the Minister from a decision of the local planning authority refusing approval, a refusal which it would be flattering to describe as suspect. If one has a case like this where it must have been known to the parties to the contract that an appeal from the local planning authority to the Minister might take for its solution six months, or nine months if there were a public inquiry, when one finds that at least the target for completion is April 1, and the appeal, if successful at all, would be toward the end of the year at best, it seems to me that, bearing in mind the urgency of the matter to the plaintiffs which I have already mentioned, one cannot include as a reasonable step an appeal to the Minister, however sure it might appear that such an appeal would ultimately succeed . . . . . ."

We cannot close our eyes to the fact that at the signing of the agreement the appellants were already using the site as a petrol-filling and service station. Neither can the respondents do so. The respondents left the responsibility to the appellants to apply for the title in continuation. From the correspondence, it seems that the appellants had done everything which was reasonably required of them.

Appellants did not pursue seriously the question of frustration of contract. Their contention is that clause 2 is in the nature of a condition precedent. If the condition precedent cannot be complied with then clause 6 comes into operation. They relied on the alternative of clause 6 "or for any other reason it shall not be legally possible to subdivide the said land in accordance with the terms of this agreement." The condition precedent is that they claimed that the term of the agreement is that there shall be two titles in continuation: one to the appellants and the other to the respondents. They are not going to go ahead with the application if it means that they must sacrifice their title for a 30 year lease. *Chitty* on Contract, Volume I, page 320, paragraph 693 states:–

"The liability of one or both of the contracting parties may become effective only if certain facts are ascertained to exist or upon the happening of some further event. In such a case the contract is said to be subject to a condition precedent. The failure of a condition precedent may have one of a number of effects. It may, in the first place, suspend the rights and obligations of both parties, as, for instance, where the parties enter into an agreement on the express understanding that it is not to become binding on either of them unless the condition is fulfilled. Secondly, one party may assume an immediate unilateral binding obligation, subject to a condition. From this he cannot withdraw; but no bilateral contract, binding on both parties, comes into existence until the condition is fulfilled. Thirdly, the parties may enter into an immediate binding contract, but subject to a condition, which suspends all or some of the obligations of one or both parties pending fufilment of the condition. These conditions precedent are, however, contingent and not promissory, and neither party will be liable to the other if the condition is not fulfilled."

The second and third conditions are irrelevant to the present case. It is the contention of the appellants that as soon as a title in continuation could not be issued the agreement came to an end. It came to an end on November 27, 1973. In support, the case of the *New Zealand Shipping Co.*

Ltd. v. *Societe Des Ateliers Et Chantiers De France*[3] was cited.

Respondents stressed the point which found favour with the learned Judge that the agreement did not talk about the petrol station. Nothing was said at all in the agreement. It is not an implied term of the agreement. He contended that the court could not take such matter into consideration. The agreement did not say the appellants could use the land as a petrol-filling and service site. Parties merely agreed that each should have a title in continuation. If the petrol station was there when the agreement was signed then the respondents could not expect the appellants to sacrifice the use of the site for development of petrol-filling and service station by accepting a 30 year lease for a title in perpetuity.

Respondents stated in respect of a registry title the State Commissioner is the approving authority. He did not dispute that the application should initially be sent to the Pemungut Hasil Tanah. See section 135(2) of the National Land Code. None of the letters came from the State Commissioner. He submitted that no decision had actually been made on subdivision. It should be pointed out that whenever the Pemungut Hasil Tanah replied by letter a copy would go to the Mentri Besar thus keeping the State authority informed.

It the learned Judge accepted the contention of the respondents, as he seemed to have, that no decision was actually made on the subdivision then, with respect, we fail to see why the learned Judge should suggest that the appellants should pursue the matter in court by way of appeal against the approving authority on ground of non-compliance with the condition improperly imposed. This is because the respondents contended as no decision was made therefore there was no appeal to be brought against a decision. The refusal of the Pemungut Hasil Tanah in *Sri Lempah's case*[1] was not due to the application being contrary to policy of Government as the basis of the refusal of the application made by the appellants. The learned Judge had found as a fact that appellants were using their portion of land as a petrol-filling and service station site prior to the signing of the agreement. Approval was also given for development of the site as a petrol-filling and service station long before the appellants decided to sell a portion of the land to the respondents. Under such circumstances how can we honestly say that the appellants were not entitled to continue with the use of their portion as a petrol-filling and service station site and that the appellants therefore expect to obtain a title in continuation as envisaged by clause 2 of the agreement.

For reasons given we are of the view that the appellants had done all that could reasonably be expected of them in pursuing their application for subdivision. In our view the appellants had complied with clause 2 of the agreement. Hence, we allowed the appeal.

Appeal allowed.

Solicitors: *Shearn, Delamore & Co.; Ng Ek Teong & Co.*

LOH CHEE KEONG v. SYARIKAT BEE HUAT SDN. BHD. & ANOR.

[A.C.J. (George J.) June 10, 1981]
[Kuantan – Civil Appeal No. 22 of 1980]

Damages – Road accident – Contributory negligence – Duty of on-coming bus.

Torts – Motor Accident – Liability – Lower court's finding of total liability on motorcyclist – Appeal allowed – Bus-driver partly to be blamed.

The lower court found that the plaintiff, the motorcyclist, had crossed over to his wrong side of the road and that while travelling on the grass verge he suddenly skidded and fell off his motorcycle which in turn fell into the path of the on-coming motor bus driven by the second defendant as servant of the first defendant. The bus collided into the motorcycle after it had fallen on the road, and after the plaintiff had been thrown off the machine and had landed on the road but out of the way of the bus.

The learned President held the plaintiff wholly liable and dismissed his claim. The plaintiff appealed.

Held: (1) it was not the act of a prudent driver for the bus driver not to anticipate the motorcyclist losing control of his machine. When he came round the bend and saw the motorcyclist on his wrong side of the road albeit at the edge of the road with one hand to his forehead, in heavy rain, he should have considerably slowed down the bus and should have given the widest berth possible to the motorcyclist, both of which elementary precautions he did not take until it was too late;

(2) although the plaintiff was substantially responsible for his injuries there was a measure of contribution in negligence on the part of the bus driver. The plaintiff/appellant was 80%, and the driver of the motor bus 20%, to blame for the accident.

Cases referred to:–

(1) *Joginder Kaur* v. *Malayan Banking Berhad & Anor.* [1971] 1 M.L.J. 98.
(2) *Coghlan* v. *Cumberland* [1898] 1 Ch. 704, 705
(3) *Stapley* v. *Gypsum Mines Ltd.* [1953] 2 All E.R. 478, 486.

CIVIL APPEAL.

Mahinder Singh for the appellant/plaintiff.

M. Kandiah for the respondent/defendant.

Cur. Adv. Vult.

George J.: This is yet another of those road accident cases involving a motor bus colliding with a motor-cycle travelling in the opposite direction to the bus.

The basic relevant finding of fact by the learned President of the Sessions Court who tried the case, was that the Plaintiff, the motorcyclist, had crossed over to his wrong side of the road and that while travelling on the grass verge he suddenly skidded and fell off his motorcycle which in turn fell into the path of the on-coming motor bus driven by the 2nd Defendant as servant or agent of the 1st Defendant. The bus collided into the motorcycle after it had fallen on the road, and after the Plaintiff had been thrown off the machine and had landed on the road but out of the way of the bus.

The learned President placed the blame for the personal injuries sustained by the Plaintiff squarely on the Plaintiff and dismissed his claim with costs.

There are a number of grounds of appeal, the first and fourth of which I could not comprehend.